

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
HYDRA COMMUNICATIONS)	FCC File No. BRMD-9157865
)	
For Renewal of License for)	
Multipoint Distribution Service Station WGW408,)	
El Centro, California)	

ORDER ON RECONSIDERATION

Adopted: March 10, 2003

Released: March 14, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:¹

1. *Introduction.* On April 12, 2002, Hydra Communications (Hydra) filed a petition for reconsideration² of the March 15, 2002 dismissal³ of its renewal application for Multipoint Distribution Service (MDS) Station WGW408, El Centro, California.⁴ For the reasons discussed below, we deny the PFR.

2. *Background.* On March 28, 1991, Hydra filed a renewal application to for Station WGW408. On June 30, 1994 and May 20, 1998, the Video Services Division (Division) of the former Mass Media Bureau requested that Hydra provide specific information regarding station ownership and service interruptions.⁵ Hydra responded to the inquiries on July 29, 1994 and June 22, 1998, respectively.⁶

3. Based on the information provided by Hydra, the Division of the Mass Media Bureau dismissed the renewal application on March 15, 2002. The Division found that “[a]llowing the licensee to retain the benefits of [Station WGW408’s] authorization after almost six years of non-service, would frustrate [the] purpose [of Section 21.303 of the Commission’s Rules] and would not be in the public

¹ Effective March 25, 2002, the Commission transferred regulatory functions for the Instructional Television Fixed Service and the Multipoint Distribution Service/Multichannel Multipoint Distribution Service from the Mass Media Bureau to the Wireless Telecommunications Bureau (Bureau). Radio Services Are Transferred From MassMedia Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002). Accordingly, the Bureau’s Public Safety and Private Wireless Division assumed all regulatory duties associated with these services effective March 25, 2002. *Id.*

² Petition for Reconsideration (filed Apr. 12, 2002) (PFR).

³ Letter from Sharon M. Bertelsen, Video Services Division, Mass Media Bureau, FCC, to Thomas M. Glab, Hydra Communications (dated Mar. 15, 2002) (Dismissal Letter).

⁴ FCC File No. BRMD-9157865 (filed Mar. 28, 1991) (Application).

⁵ See Dismissal Letter at 1.

⁶ See *id.*

interest.”⁷ Section 21.303(d) provides, in relevant part, that

If any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed . . . , the licensee shall, within thirty days of the end of such period of nonuse: (1) Submit for cancellation the station license . . . ; (2) File an application for modification of the license . . . to delete the unused frequency . . . ; or (3) Request waiver of this rule and demonstrate either that the frequency will be used (as evidenced by appropriate requests for service, etc.) within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse.⁸

The Division explained that this rule was intended to promote and ensure efficient use of the spectrum.⁹ The Division found that application of the rule in this instance reinforces the Commission’s reporting requirements. Further, it allows for the recapture of spectrum from an entity who has not yet provided service and make it available to an entity willing and able to provide service.¹⁰ The Division also noted that “silent” stations are inconsistent with the public interest because they fail to offer any service to the public.¹¹ Although Hydra did not request a waiver of Section 21.303, the Division explained that “[n]either contract disputes nor lack of economic opportunity are extraordinary or special circumstances justifying a waiver of Section 21.303(d).”¹² The Division therefore dismissed the application on March 15, 2002. Hydra timely filed the instant PFR on April 12, 2002.

4. *Discussion.* The PFR contends that the Division erred in concluding that Station WGW408 “discontinued service for twelve months without requesting a waiver of Section 21.303 of the Commission’s Rules.”¹³ The PFR emphasizes that Station WGW408 was timely constructed and has been leased to Satellite Microcable Corporation since 1994.¹⁴ The PFR asserts that Satellite Microcable Corporation, as the customer, has the responsibility to “decide what programming is to be rendered by this station. . . [and] the right to commence broadcasting at any time it so chooses.”¹⁵ According to the PFR, “[t]he fact that the *customer* may from time to time discontinue programming does not mean that the station has discontinued service and is thus an ‘unused license’ within the meaning of [Section] 21.303.”¹⁶

⁷ Dismissal Letter at 2.

⁸ See 47 C.F.R. § 21.303(d).

⁹ Dismissal Letter at 2 (*citing* Revision of Part 21 of the Commission’s Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 (1987) (*Part 21 R&O*)).

¹⁰ Dismissal Letter at 2.

¹¹ *Id.* at 1.

¹² *Id.* at 2.

¹³ PFR at 1.

¹⁴ PFR at 2.

¹⁵ PFR at 2.

¹⁶ PFR at 2 (emphasis in original).

The PFR also argues that “Section 21.303 is intended to address the instance where the licensee fails to make the station available for service by itself or a customer.”¹⁷ The PFR contends that Section 21.303 is therefore inapplicable to the instant matter because Hydra, as the licensee, leased a fully constructed station to Satellite Microcable Corporation, which, as the “customer,” elected not to operate the facilities or provide programming for a period far exceeding twelve months due to market conditions. Aside from the applicability of Section 21.303, Hydra raises no other issue on reconsideration.

5. Hydra’s interpretation is unsupported and frivolous. The express language of Section 21.303(d) of the Commission’s Rules requires the licensee to take one of three actions “if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed. . . .”¹⁸ The three options are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver pursuant to Section 21.303(d)(3).¹⁹ Hydra concedes that Station WGW408 has failed to provide *any* service since at least 1995.²⁰ By way of background, we note that prior to the adoption of Section 21.303(d), the Commission’s Rules did not require licensees to relinquish unused frequencies.²¹ The Commission found that, “[i]n addition to preventing others from using the spectrum, this results in the Commission being unable to discern when spectrum is not being used or is being underutilized.”²² Therefore, the Commission adopted Section 21.303(d) to ensure the efficient use of the spectrum by requiring licensees to submit unused licenses to the Commission for cancellation.²³

6. Contrary to Hydra’s argument set forth in the PFR, a licensee that enters into a channel lease agreement assumes the risk of license cancellation if the third party fails or ceases to provide programming.²⁴ We note that Hydra had twelve months to work out alternative arrangements and/or ensure that the station’s facilities were used to provide service. In accordance with Section 21.303(d), Hydra had regulatory options available to it if it desired to retain the station license - for example, request a waiver pursuant to Section 21.303(d)(3).²⁵ Hydra failed to avail itself of such options to do so. In fact, as noted by the Division, Station WGW408 was not in operation for more than six years. We therefore find that the Division correctly applied Section 21.303(d) in this instance, and we deny Hydra’s PFR.

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 21.303(d).

¹⁹ 47 C.F.R. § 21.303(d)(1)-(3).

²⁰ *See, e.g.*, PFR at 2.

²¹ *See Part 21 R&O*, 2 FCC Rcd at 5724 ¶ 82.

²² *Id.*

²³ *See id.*

²⁴ *See, e.g.*, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, 12 FCC Rcd 16802, 16904-16905 ¶¶ 188-189 (1997).

²⁵ *See* 47 C.F.R. § 21.303(d)(1), (3). Modification of the license to delete *only* the unused frequencies was not an option in this matter. *Cf.* 47 C.F.R. § 21.303(d)(2).

7. We also reject Hydra's argument that it was improper for the Division to dismiss a "timely filed and acceptable renewal application."²⁶ Section 21.303(d) allows a frequency authorization to "be cancelled or deleted from a license for failure to render service as authorized during a consecutive period of twelve months at any time after completion of construction or if removal of equipment or facilities has rendered the station not operational."²⁷ Since the license for Station WGW408 had cancelled, the Division properly dismissed Hydra's renewal application because it did not have a license to renew.

8. ACCORDINGLY, IT IS ORDERED pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Hydra Communications on April 12, 2002 IS DENIED.

9. This action is taken under designated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

²⁶ PFR at 3 n.2.

²⁷ See Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services, CC Docket No. 93-2, *Notice of Proposed Rulemaking*, 8 FCC Rcd 1112, 1114 ¶ 16 (1993).